

# **Donated Resources**

**The Propriety of Accepting Funds,  
Property or Services from Industry  
In the Prosecution of Federal Cases**

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**DONATED RESOURCES  
THE PROPRIETY OF ACCEPTING FUNDS,  
PROPERTY OR SERVICES FROM INDUSTRY  
IN THE PROSECUTION OF FEDERAL CASES**

**I.** Whether and under what circumstances federal prosecutors can accept gifts of cash, property or services from outside sources is an issue governed by federal statutes and regulations, a Department of Justice Order, the Standards of Ethical Conduct for Employees of the Executive Branch, each state's rules of professional conduct, and sound judgment.

**A.** Contributions of cash or property from outside sources is permissible only with the prior approval of the Assistant Attorney General for Administration.

**B.** Contributions of services from outside sources may be permissible without prior approval but the issue requires an analysis of the type of services offered, the relationship of the donor to the underlying investigation, and other circumstances which may give rise to ethical considerations.

**II.** It is important to first distinguish an *offer of assistance* from the *giving of a gift*.

**A.** Law enforcement efforts have traditionally relied upon assistance from victims and witnesses and our analysis here does not alter that relationship.

**B.** The role of victims and witnesses in providing assistance to law enforcement efforts has long been recognized and accepted by the courts as the following cases reflect:

1. *United States v. Adamson*, CR S-99-393, at 9 (E.D. Cal., Order dated May 15, 2000) (Attachment C)
2. *Commonwealth v. Ellis*, 708 N.E. 2d 644, 651 (Mass. 1999)
3. *Wilson v. Layne*, 526 U.S. 603, 611-12 (1999)

**C.** Victims and other private parties are often uniquely positioned to provide critical information to facilitate the investigation and prosecution of crimes and regularly:

1. Turn over the fruits of an internal investigation to law enforcement;
2. Meet with agents and prosecutors to provide information and expertise that may ultimately be used to guide the direction of the investigation;
3. Meet with agents and prosecutors to review and/or examine seized evidence and thereby assist agents and prosecutors in determining the significance of the evidence, based upon their own person knowledge and/or expertise; and

4. Provide expert testimony at trial.

This assistance may be costly to a victim company in terms of the resources expended but it is not a *gift* or “donation” governed by the rules of ethics or the statutory and regulatory framework described below.

**D.** Assistance provided by a party who is related to the victim will likely also constitute *assistance* rather than a *gift*.

1. Related parties are those who have a close relationship with the victim or perhaps a shared interest with the victim in providing assistance to law enforcement and may include the victim’s family members, an industry association or agents or contractors hired by a victim.
2. Example: a corporation may have hired a computer security firm to monitor its computer network. If the case involves the corporation’s computer network, the security firm would likely be viewed as a related party.

**E.** There are two circumstances in which aid or cooperation by a victim or related party will not be considered *assistance*:

1. A direct contribution of cash will, virtually without exception, be viewed as a *gift*. Funding a law enforcement effort typically raises ethical concerns and gives rise to “conflict of interest” problems. Two cases are illustrative:

\* *People v. Eubanks*, 927 P.2d 310 (Cal. 1997), conflict of interest found where victim paid the cost of experts retained by the district attorney’s office

\* *Commonwealth v. Ellis*, 708 N.E. 2d 644 (Mass 1999), no conflict of interest found where assistance provided by insurance association was statutorily authorized

An exception to this general rule applies. When funds are provided to purchase a victim’s stolen property, such funds are considered *assistance* so long as the goods are returned to the victim after the resolution of the government’s case.

2. The assistance provided by a victim or a related party must be in connection with and limited to a specific case or cases involving that victim and, if it is not, it will typically be considered a *gift*.

\* A computer company’s provision of free computers to assist with the investigation and prosecution of the theft of trade secrets from that company will generally constitute *assistance*.

\* But if the computer company allows the government to use the computers for unrelated investigations and prosecutions, either during the pendency of the case in which it is a victim or after, the *assistance* at that juncture will likely be viewed as a *gift*, implicating the approval process discussed below.

**F.** Assistance provided by unrelated third parties is generally considered a *gift* and therefore subject to the Department's rules that govern the acceptance of gifts.

1. Examples include

- \* Conducting a forensic analysis of evidence for the government
- \* Providing the government with space or equipment
- \* Providing expert testimony at trial in the government's case
- \* Providing training courses for agents and prosecutors

When this type of *assistance* is provided at no cost to the government, it is typically considered a *gift*.

2. However, two exceptions apply:

- \* When the third party provides assistance in the form of answering an agent's or prosecutor's questions, identifying suspects, and providing fact-based testimony at trial, this assistance falls within the type of assistance citizens have traditionally provided to assist law enforcement efforts.
- \* Or, when the third party provides the government with product samples or product information to use in its forensic analysis of evidence, such *assistance* has typically not been considered a *gift*.

**III.** When, however, the aid offered to the government constitutes a gift of cash, money or property from an outside source, three federal statutes are implicated.

**A.** The Miscellaneous Receipts Act, 31 U.S.C. § 3302, requires any agent of the United States who receives money for the Government from any source to deposit the funds into the Treasury. In other words, the funds must be claimed as public revenues and are subject to public control as a result.

**B.** The Anti-Deficiency Act, 31 U.S.C. § 1341, prohibits agencies from expending public funds in excess of legislative appropriations. Further, the augmentation of appropriations principle generally prohibits an agency from augmenting its congressional appropriations

with funds from other sources without specific statutory authority. *See* 31 U.S.C. § 1342; *see also* the discussion set forth in the Memorandum of Deborah C. Westbrook, Impropriety of Acceptance of Donated Property and Services from Non-Governmental Sources, dated June 10, 1994. The Memorandum is included with these materials as Attachment A.

C. The provisions of 28 U.S.C. § 524(d) authorize the Attorney General to accept, hold, administer, and use gifts, devises, and bequests of any property or services for the purpose of aiding or facilitating the work of the Department of Justice. Such gifts are to be deposited into the Treasury in a separate fund and held in trust by the Secretary of the Treasury for the benefit of the Department and are only to be disbursed upon order of the Attorney General.

IV. Department of Justice Order 2400.2, September 2, 1997, governs the solicitation and acceptance of gifts of cash or property. *See* Attachment B. The Order makes no mention of a gift of services.

A. Under the Order, no employee of the Department may *solicit* gifts, devises and bequests of property of any kind or encourage the solicitation of any such gift in the absence of advance approval by either the Attorney General or the Deputy Attorney General.

B. Prior approval for the *acceptance* of gifts has been delegated to the Assistant Attorney General for Administration who determines whether to accept any gift of cash or property based on four specifically delineated criteria:

1. Whether the gift is appropriate for use (including liquidation) by the Department;
2. Whether any condition the donor places on the Department's acceptance or use of the gift is acceptable to the Department;
3. Whether any Department employee solicited the gift or encouraged its solicitation and, if so, whether the solicitation had the prior approval of the Attorney General or the Deputy Attorney General; and
4. Whether acceptance of the gift is appropriate and advisable from the perspective of conflict of interest and government ethics guidelines, including whether acceptance of the gift would create the appearance of impropriety.

C. A prospective Donor must complete a Gift Donation Form prior to delivery of the gift. This form requires the donor to identify the gift, its value (if non-cash), the intended purpose of the gift and whether there are any matters pending or likely to arise in the future that might involve the donor and the Department of Justice. By executing the

form, the donor also acknowledges absolute relinquishment of any right of ownership or possession of the gift.

**D.** In order to obtain approval to accept a gift on behalf of the Department, a Gift Acceptance Form must be completed. Information similar to that required to be provided on the Gift Donation Form is required on the Gift Acceptance Form. In addition, the identity of the DOJ employee who received the gift and the circumstances under which the gift was given must be documented.

1. In order to obtain approval to accept a gift on behalf of the Department, the request must be submitted to the Justice Gift Fund Committee. Questions regarding this procedure should be directed to JMD's Property Management Services at 202/307-2761.

2. Gifts from Department employees generally will not be accepted.

**V.** The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, also govern the solicitation and acceptance of gifts from outside sources.

**A.** Subpart E imposes upon federal employees an obligation to perform official duties in an impartial manner. To the extent that the solicitation or acceptance of a gift from an outside source may cause a reasonable person with knowledge of the relevant facts to question the prosecutor's impartiality in the matter, the gift should not be accepted.

**B.** Subpart B governs gifts from outside sources and prohibits an employee from directly or indirectly, soliciting or accepting a gift from a prohibited source or given because of the employee's official position. A prohibited source includes anyone who:

1. Has or seeks official action or business with the Department;
2. Is regulated by the Department;
3. Has interests that may be substantially affected by the performance of an employee's official duties; or
4. Is an organization composed mainly of persons described above.

**VI.** The provision of voluntary services to the government is generally prohibited except for emergencies involving the safety of human life or the protection of property. The term "emergencies involving the safety of human life or the protection of property" does not include ongoing regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property. 31 U.S.C. § 1342. This prohibition has its basis in the Anti-Deficiency Act. In addition, employees may not waive a salary for which

Congress has set a minimum. *See, e.g., Glavey v. United States*, 182 U.S. 595 (1901). An exception to Section 1342's prohibition has been created for circumstances where Congress has set no minimum salaries for employees and is set forth in 5 U.S.C. §3109 which provides for the hiring of consultants and establishes no minimum salary.

A. Consultants may not, however, be employed to perform “governmental functions” and their services must be intermittent or temporary and limited to tasks of a purely advisory nature. See Opinion of Office of Legal Counsel, U.S. Department of Justice, 6 U.S. Op. Off. Legal Counsel 160, February 25, 1982; Opinion of Office of Legal Counsel, U.S. Department of Justice, 2 U.S. Op. Off. Legal Counsel 322, January 27, 1977.

B. An expert or consultant retained under 5 U.S.C. § 3109 may be employed without pay, provided the individual agrees in advance to waive any claim for compensation for those services, 5 C.F.R. § 304.104(c). The authority to arrange for volunteer services, however, does not in any way diminish the “appearance” considerations enumerated above.

**VII.** In addition to the statutory and regulatory schemes, the DOJ Order and the Standards of Conduct referenced above, all of which are intended to preserve the independence and integrity of the Department in carrying out its mission, case law and each state’s version of the Model Rules of Professional Conduct similarly provide guidance on the considerations governing the solicitation and/or acceptance of gifts. Courts typically use a “conflicts of interest” analysis. There is a “conflict of interest” provision in the ABA’s Model Rules of Professional Conduct as well.

A. Rule 1.7(b), Model Rules of Professional Conduct (2001):

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

**B.** When a prosecutor is challenged for having been influenced by the receipt of gifts or services from an outside entity or individual, the analysis turns on whether the prosecutor will be able to exercise independent and impartial judgment in prosecuting a criminal case. The prosecution of a criminal case by a prosecutor whose prosecutorial judgment cannot be independent and disinterested because of financial or other improper interest in the case is inconsistent with basic notions of fairness and creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. Once an impermissible conflict of interest is identified, the prosecutor is disqualified regardless of the gravity of the conflict or whether the accused suffers any actual prejudice. To establish a conflict of interest, a defendant can show that a prosecuting attorney simultaneously represents some party with an interest in the outcome of the case or has violated federal law or professional ethical standards. *See* Order dated May 15, 2000, pp. 4-5, *United States v. Adamson*, ED CA, CR. S-99-393 GEB, included with these materials as Attachment C.

**C. Examples:**

1. *California v. Eubanks*, 927 P.2d 310 (Cal. 1997), disqualification of prosecuting attorney warranted:

- \* Corporate victim contributed approximately \$13,000 toward costs of district attorney's investigation of defendants' alleged theft of trade secrets.

- \* Largest payment, which was in the amount of \$9,450, was paid to an independent contractor for computer-related technical assistance for a debt already incurred by the district attorney which the victim paid in response to a direct request from the district attorney's office.

- \* Debt was conceded by the district attorney's office to be substantial given the office's resources.

- \* The prosecution's case was factually weak.

- \* These factors created a conflict of interest of sufficient gravity with respect to the likelihood of fair treatment of the defendants.

2. *Commonwealth v. Ellis*, 708 N.E. 2d 644 (Mass. 1999), disqualification not warranted

- \* Case involved a statutory scheme under which the State's Insurance Fraud Bureau (IFB), a statutorily authorized investigative agency financed by insurers, referred insurance fraud cases to the Attorney General's Fraud Division.



\* The Attorney General's Fraud Division was statutorily devoted to work full-time on such cases.

\*The IFB provided the Fraud Division with computer software, reimbursed the Division for the purchase of computer hardware, and paid the costs of a computer expert.

\* The Massachusetts Supreme Court rejected the defendant's due process challenge to the prosecutor's alleged conflict of interest and held that the IFB had merely provided acceptable assistance to the prosecution.

3. *United States v. Adamson, supra*, disqualification not required

\* Hewlett Packard (HP) contributed approximately \$6250 toward investigative costs and donated several pieces of computer and electrical equipment to a High-Tech Crimes Task Force of which the United States Attorney was a member.

\* Two HP employees accompanied Task Force members during the execution of a search warrant and information regarding certain dates and equipment serial numbers gathered by HP's investigators were included in the Second Superseding Indictment.

\* The Court found significant the fact that HP's assistance was provided to the Task Force and not directly to the USAO, following the reasoning in Ellis.

\* The court rejected the notion that the prosecutor lost or appeared to have lost his impartiality because two HP employees accompanied Task Force officers in executing a search warrant and because the prosecutor had discussed "strategic considerations" with HP's attorneys, noting that a prosecutor is permitted to obtain information from knowledgeable victims about alleged crimes and using such information does not necessarily imply a failure to exercise independent prosecutorial judgment.

4. *Hambarian v. Superior Court*, 44 P.3d 102 (Cal. 2002), disqualification not required

\* City paid more than \$314,000 for a certified public accountant's forensic work on a district attorney's investigation of alleged financial fraud by a city contractor's employee.

\* The City's assistance freed the district attorney's auditor to work on other cases.

\* However, the fact that the City was pursuing a civil action, the district attorney was unaware of the amount paid for the forensic services until the recusal motion was filed, and the city was a government, rather than private, victim, led the Court to conclude that the district attorney would not feel obligated to the City.

\* No one fact will compel the disqualification of a prosecutor; rather, the entire complex of facts must be reviewed to determine whether the conflict of interest makes fair and impartial treatment of the defendant unlikely.

## **VIII. Application of the Principles**

**A. Solicited Gifts.** It is unlikely that a solicited gift will be approved, however, a gift of computer hardware for use in future investigations may be acceptable, assuming the approval requirements of DOJ Order 2400.2 are met.

**B. Cash Donations.** Donations of cash are not likely to be approved. Because it is important that the public have confidence that the decisions made by federal prosecutors are made with the highest degree of independence, impartiality and integrity, and because cash donations to law enforcement tend to erode public faith in the impartiality of our prosecutorial decision-making, it is doubtful that such donations or gifts would be approved by the Assistant Attorney General for Administration. Even if approved, federal prosecutors would not be free to exercise discretion in the disbursement of the funds. Gifts of cash must be deposited in a separate Treasury fund and held in trust for the benefit of the Department and may only be disbursed by the Attorney General.

**C. Donations of Property.** Such donations likely will not give rise to the same level of ethical scrutiny as is expected to be the case with cash donations, however, the four factors set forth in DOJ Order 2400.2 will still require analysis and the most significant is likely to be “whether acceptance of the gift is appropriate and advisable from the perspective of conflict of interest and government ethics guidelines, including whether acceptance of the gift would create the appearance of impropriety.”

**D. Donation of “Loaned” Property.** Consider whether it makes a difference whether the property is donated or loaned to the government. A “loan” of property will undoubtedly still require implementing the approval process set forth in DOJ Order 2400.2. Moreover, the fact that the property will ultimately be returned to the donor may give rise to an “appearance” problem that the donor is exerting control over the direction of the investigation and prosecution. It may be necessary to enter into an agreement with the donor who is loaning the property establishing that the donor understands that the investigation will be controlled by the law enforcement agency and that the investigation is not intended in any way to benefit the donor. Although such an agreement may diminish “appearance” problems, it may conflict with the Gift Donation

Form which requires the donor to relinquish all property rights to the gift. Moreover, a loan may give rise to continuing private involvement in a federal investigation, again giving rise to concerns regarding impartiality.

**E. Donation of Services.** The provisions of 28 U.S.C. §524(d)(1) authorize the Attorney General to accept donated services as well as gifts, however, DOJ Order 2400.2 makes no mention whatsoever of donated services. Notwithstanding that omission, the provisions of 5 U.S.C. §3109 authorize the hiring of consultants and establish no minimum compensation requirements. The regulation set forth at 5 C.F.R. § 304.104(c) provides that an expert or consultant retained under 5 U.S.C. § 3109 may be employed without pay, provided the individual agrees in advance to waive any claim for compensation for those services.

1. One can conclude, therefore, that gifts of services may be made to the Department to assist with a federal prosecution and included among those gifts is the expert who offers to testify at a reduced fee or perhaps for no fee at all.

2. It is also important to consider those services which are more in the nature of “donated property” than “donated service”. For example,

- \* A company with unused warehouse space offers it to the Government to store seized contraband.

- \* A corporation gives law enforcement personnel off-hours access to its computer resources to decrypt a seized hard drive.

- \* A bank permits law enforcement personnel to operate an undercover internet site from its network.

In each case, the government could purchase the service. It is therefore recommended that an analysis of the factors set forth in DOJ Order 2400.2 be undertaken. A careful analysis will be particularly important when the company offering the services is the victim. Although, as discussed above, we recognize that cooperation and aid provided by victims and related parties is generally viewed as *assistance*, rather than as a *gift*, these examples may give rise to “conflict of interest” and “appearance” issues requiring careful consideration. The safest course of action may be to avoid the acceptance of such services and thereby avoid damaging cross examination at trial. It may well be preferable to hire a disinterested party to perform the services instead.

## **CREDITS:**

Significant credit is given to members of the Computer Crime & Intellectual Property

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